LIBRARY
PREME COURT. U. S.

FILED
FEB 18 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 962.

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Appellants-Petitioners,

versus

THE DAY COMPANIES, INC.,
Appellee-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

JAMES D. MADDOX,
P. O. Box 29,
Rome, Georgia 30161,
Attorney for Respondent.

Of Counsel:
MATTHEWS, MADDOX, WALTON & SMITH,
P. O. Box 29,
Rome, Georgia 30161,
WILLIAM J. THREADGILL,
THREADGILL & SMITH,
P. O. Box 1094,
Columbus, Mississippi 39701.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

Page

Statement of the case 1

Reasons for denying the writ 2

I. Decision is not in conflict with Georiga law 2

II. Court did not fail to apply latest Georgia decisions 6

Conclusion and motion for damages 9

Cases Cited.

Aristic Ornamental Iron Co. v. Wilkes (1957), 213 Ga. 654, 100 S. E. 2d 731 5

Bonner v. Bailey (1921), 152 Ga. 629, 110 S. E. 875.. 5

Budget Rent-A-Car Corporation of America v. Fein (1965), 342 F. 2d 509 10

Corley v. City of Atlanta (1935), 181 Ga. 381, 182 S. E. 177 9

Dixie Bearings, Inc. v. Walker (1963), 219 Ga. 353, 133 S. E. 2d 338 5

Everett v. Boone (1923), 157 Ga. 372, 121 S. E. 240 .. 5

Fox v. Avis Rent-A-Car Systems, Inc. (1967), 223 Ga. 571, 156 S. E. 2d 910 ..... 6, 8

Glosser v. Powers (1952), 209 Ga. 149, 71 S. E. 2d 230 4

Hanley v. Savannah Bank and Trust Company (1951), 208 Ga. 585, 68 S. E. 2d 581 4

Jewell Tea Co., Inc. v. Cartersville (1938), 185 Ga. 799, 196 S. E. 712 9

Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 51 S. E. 2d 669 4

Seay v. Spratling (1909), 133 Ga. 27, 65 S. E. 137 3

Strauss v. Phillips (1935), 180 Ga. 641, 180 S. E. 2d 123 ..... 8, 9

Taylor Freezer Sales Co. v. Sweeden Freezer Eastern Corp. (1968), 224 Ga. 160, 160 S. E. 2d 356 ..... 3, 8

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 962.

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Appellants-Petitioners,

versus

THE DAY COMPANIES, INC.,
Appellee-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

STATEMENT OF THE CASE.

Respondent, The Day Companies, Inc., adopts as substantially correct the statement of the case set forth in the petition. It is pointed out, however, that the amended complaint alleged: "The manufacturing operation of Farris Plywood Corporation was highly specialized consisting of the manufacture of plywood door skins for use in the construction of flush doors. Eighty-five percent of its

production of door skins was birch and the remainder was a mixture of walnut, oak, mahogany, pecan, cherry, ash and gum in varying colors and grades." It also alleged that Columbus Packing Company, Inc. would not have agreed to purchase the stock of Farris Plywood had not John L. Farris, principal stockholder, agreed individually to enter into the covenant not to compete with Farris in the area at that time operated in by Farris until December 31, 1971. It also alleged that John L. Farris and Claud T. Patat, Jr., knew the nature of the manufacturing operation engaged in by Farris Plywood Corporation and the geographical area in which said corporation operated.

REASONS FOR DENYING THE WRIT.

This case involves application by the Fifth Circuit Court of Appeals of the statutory and judicial law of Georgia to a private contract. The decision rendered by the Fifth Circuit is applicable only to the facts in this particular litigation and does not involve a case wherein the Court of Appeals "has decided an important State or Territorial question in a way in conflict with applicable State or Territorial law".

I.

Decision Is Not in Conflict With Applicable Georgia Law.

Petitioners contend that the decision of the Fifth Circuit Court of Appeals is in conflict with applicable Georgia law. In support they quote Georgia Code, § 20-504, to the effect that certain contracts in **general restraint** of trade are against the policy of the law and cannot be enforced. This Code Section has been interpreted by the Appellate Courts of Georgia time and again. The Georgia courts have consistently held that contracts in **reasonable restraint** of trade are valid and enforceable.

Georgia, as most states, makes a distinction between covenants relating to the sale of a business and those that are ancillary to an employment contract. The most recent restatement of this doctrine being in **Taylor Freezer Sales Co. v. Sweeden Freezer Eastern Corp.** (1968), 224 Ga. 160, 160 S. E. 2d 356, where the Court held:

> "Greater latitude is allowed in those covenants relating to the sale of a business, or dissolution of a partnership than in those covenants ancillary to an employment contract. 17 CJS 636, par. 354; Rakestraw v. Lanier, supra [104 Ga. 188, 30 S. E. 735]; Hood v. Legg, 160 Ga. 620 (128 S. E. 891); J. C. Pirkle Machinery Co. v. Walters, 205 Ga. 167 (52 S. E. 2d 853)."

The validity of contracts not in general restraint of trade was reaffirmed by the decision in **Seay v. Spratling** (1909), 133 Ga. 27, 65 S. E. 137, cited by petitioner, in which the Court at page 29, held:

> "Our Civil Code, § 3668 [now 20-504] declares that 'contracts in general in restraint of trade' can not be enforced. In the case of Goodman v. Henderson, 58 Ga. 567, it is said that 'The principle seems to be, that the restraint of trade must be limited in territory, limitation in time not affecting the validity of the contract. . . . So that the court rules, in 10 Ga. [Holmes v. Martin, p. 503], that the only requisition was, that the contract should be founded upon a good and valuable consideration and confined in space. It is true that Judge Lumpkin does use the words, "or for a limited time," but in the very case he was deciding the time was unlimited, and we have shown that the limit as to time makes no difference if the contract be limited as to space.' The opinion from which this excerpt was taken was a deliverance of this court in a case where the restraint of trade as contained in the contract was

not general, and the contract was upheld as valid; but the doctrine announced is distinctly recognized in numerous decisions of this court. In the case of Holmes v. Martin, supra, Judge Lumpkin, speaking for the court, said: 'But the distinction was early taken, and is established by an unbroken current of authority, English and American, between such stipulations as are in general restraint of trade, and such as are in restraint of it only as to particular places and persons, or for a limited time. The latter, if founded upon a good and valuable consideration, are valid, while the former are universally prohibited.' "

Hanley v. Savannah Bank and Trust Company (1951), 208 Ga. 585, 68 S. E. 2d 581, had to do with an entirely different situation. The court there dealt with an effort to enforce specific performance of a contract in which a part of the consideration of the alleged contract to make a will was an agreement by the mother to surrender possession of her infant child in order to receive a benefit for herself and her other children. The Court held such a contract was void as being against public policy. Likewise, **Glosser v. Powers** (1952), 209 Ga. 149, 71 S. E. 2d 230, also cited by petitioner dealt with a scheme to defraud the United States Government by improper use of the defendant's eligibility to secure a low interest long term loan pursuant to the Servicemen's Readjustment Act of 1944. **Orkin Exterminating Co. v. Dewberry**, 204 Ga. 794, 51 S. E. 2d 669, concerned a covenant not to compete ancillary to a contract of employment made by a veteran who applied for on-the-job training under the Servicemen's Readjustment Act. The Court in that case held the contract of employment would have prohibited him from continuing his employment in the trade for which he had been trained almost anywhere in the State of Georgia, including many areas in which Orkin Ex-

terminating Company had never engaged in business. The Court found the territorial scope of the contract was unreasonable and unnecessary for the protection of the party in whose favor the restraint was imposed as well as oppressive to the party restrained and opposed to the interest of the public and accordingly contrary to public policy and void.

Each of the Georgia cases cited by petitioner as supporting their allegation that "general language of the type and character here presented has been consistently denied enforcement by the Georgia Courts" was cited in petitioners' briefs in the Circuit Court of Appeals. The Circuit Court considered these cases and obviously found that they were not applicable to the factual situation presented.

Dixie Bearings, Inc. v. Walker (1963), 219 Ga. 353, 133 S. E. 2d 338; and **Artistic Ornamental Iron Co. v. Wilkes** (1957), 213 Ga. 654, 100 S. E. 2d 731, each involved covenants ancillary to contracts of employment. **Bonner v. Bailey** (1921), 152 Ga. 629, 110 S. E. 875, was based upon a lack of territorial limitation in the contract. **Everett v. Boone** (1923), 157 Ga. 372, 121 S. E. 240, also cited by petitioner was likewise decided upon the ground there was no limitation as to space or territory in the contract. The first headnote of that decision being:

> "A contract without limitation as to space or territory, although limited as to time, not to engage in a particular trade or business, is unenforceable as being against the policy of the law. Consequently, where one agreed, upon a valuable consideration, to sell his entire stock of goods, etc., and not to engage in business 'in competition with' the purchasers for a period of three years, such a contract is without limitation as to space or territory, and is unenforceable as being in violation of the rules laid down above."

It will be noted the Georgia Court apparently was not concerned by the language "in competition with".

None of the cases cited in the petition for a writ of certiorari are in any way in conflict with the decision of the Fifth Circuit Court of Appeals in the instant case, and on the contrary are in complete harmony with it.

The decisions of the United States Supreme Court cited on page 8 of the petition as supporting the conclusion that certiorari is required deal with completely different factual situations. Each of the four cases there cited involved instances in which the Supreme Court granted certiorari because the Courts of Appeal had failed to apply applicable State laws. Not a single one of the cases cited dealt with an instance where the Supreme Court disagreed with the interpretation of a Court of Appeals as to the applicable State law, after it had been construed and applied by the Court of Appeals.

In the instant case, the Fifth Circuit Court of Appeals did apply Georgia law and rested its decisions squarely upon Georgia law. There was no failure on its part to apply State law. Petitioner complains because the Court of Appeals did not interpret the applicable Georgia statutes and decisions in the same manner that petitioners and the District Court interpreted them.

II.

Court Did Not Fail to Apply Latest Georgia Decision.

The petitioner argues that the Fifth Circuit Court of Appeals made no reference to **Fox v. Avis Rent-A-Car Systems, Inc.** (1967), 223 Ga. 571, 156 S. E. 2d 910, which it alleges to be the latest decision of the Supreme Court of Georgia. This case was cited by petitioners in their brief in the Court of Appeals and in their petition for rehearing. Obviously it was carefully considered by the Court of Appeals.

The decision of the Court of Appeals is in accord with the decision of the Supreme Court of Georgia in the Fox case. In that particular case Avis filed suit against Fox alleging in two counts violations of two separate contracts between Avis and Fox. The Court upheld an agreement in Count One that Fox would "not engage in competition with ITT or any subsidiary of ITT in any phase of the vehicle rental or leasing business or any other business in which employee is engaged at the time of" the termination of his employment with the plaintiff for a period of two years after the termination date "in any city in the United States where employee was employed or stationed by ITT or any subsidiary of ITT." The second count which the Supreme Court held to be fatally defective contained language in which Fox agreed "not to engage in competition with the company or any subsidiary of the company for a period of two years after such termination date in any city of the United States wherein he was, in the five year period preceding such termination date, employed or stationed by the company or any subsidiary of the company." The Court held the contract was fatally defective and void because it is indefinite and for that reason unreasonable in the description of the prohibitive business. It will be noted that this involved a contract not to engage in competition with International Telephone and Telegraph Corporation or any subsidiary of the company. The contract dealt with in the second count did not restrict it to any business of ITT or any subsidiary in which the employee Fox had been engaged, but related to competition with the company or any subsidiary of the company. It was obviously this language which the Court found to be too broad.

The Fox case is easily distinguishable from the instant case. Here we are dealing with a situation where John L. Farris was the president and principal stockholder of Farris Plywood Company. This was the only business in

which he agreed not to compete. Columbus Packing Company, Inc. paid the sum of $465,000.00 to purchase the capital stock of Farris Plywood Company and alleged that it would not have purchased the stock had not the president and principal stockholder as a condition of the sale agreed not to compete with Farris Plywood Company in the area in the business operated in by Farris for a period of five years.

The Fox case dealt with an employment contract and not with the sale of a business. A later case, **Taylor Freezer Sales Company, Inc. v. Sweeden Freezer Eastern Corporation** (1968), 225 Ga. 160, 160 S. E. 2d 356, decided March 7, 1968, also dealt with an employment contract. The Supreme Court of Georgia there reiterated the rule referred to above that whether the restraints imposed by an employment contract are reasonable is a question of law for determination by the court and held as previously pointed out:

> "Greater latitude is allowed in those covenants relating to the sale of a business, or dissolution of a partnership than in those covenants ancillary to an employment contract."

Petitioners apparently are arguing that the Fifth Circuit Court of Appeals could not rest its decision upon **Strauss v. Phillips** (1935), 180 Ga. 641, 180 S. E. 2d 123, because they contend **Fox v. Avis Rent-A-Car Systems, Inc.** (1967), 223 Ga. 571, 156 S. E. 2d 910, is a later decision and that the Court would be bound to follow Fox. While we do not concede that there is any conflict between the Strauss and Fox decisions, nor do we concede that the Fifth Circuit Court of Appeals failed to follow the rule of law in both cases, if there were a conflict between the two decisions of the Supreme Court of Georgia the Fifth Circuit Court of Appeals would be bound to follow the older decision in accordance with the decisions of the Supreme Court of

Georgia. The Georgia court in **Corley v. City of Atlanta** (1935), 181 Ga. 381, 182 S. E. 177, held:

> "The present case cannot, in the nature of the facts, be distinguished from any of the cases just cited. The decision in each of such cases was concurred in by all of the Justices, and there is no earlier decision which, if properly considered, may be taken as authority to the contrary. These decisions are, therefore, controlling; and they are none the less so even if some later decisions to the contrary may have been rendered, and even though such later decisions may have had the concurrence of all of the Justices. Code of 1933, § 6-1611; Calhoun v. Cawley, 104 Ga. 335, 30 S. E. 773."

See also to the same effect **Jewell Tea Co., Inc. v. Cartersville** (1938), 185 Ga. 799, 196 S. E. 712, holding that earlier unanimous decisions must be followed.

It may be pointed out here that the decision of the Supreme Court of Georgia in **Strauss v. Phillips**, supra, was concurred in by all of the Justices.

The decision did not overturn a clearly permissible result under Georgia law. The Fifth Circuit Court of Appeals found that the District Judge had erroneously applied the applicable Georgia law to the factual situation existing in this case and properly reversed and remanded the case for trial. The correction of errors is the function of the Circuit Court of Appeals. The reasons for the Circuit Court's decision were fully set out in its decision and there is no reason to reiterate these reasons or the citations of authority here.

CONCLUSION AND MOTION FOR DAMAGES.

The Fifth Circuit Court of Appeals recognized the distinction made in Georgia law between covenants ancillary to the sale or dissolution of a business and those ancillary

to contracts of employment. Georgia courts in line with the overwhelming weight of authority in this country hold that greater latitude is allowed in those covenants relating to the sale of a business than in those ancillary to an employment contract. This is for the very obvious and good reason that an individual dealing with an employer regarding terms of employment is at a disadvantage and might be forced to agree to onerous and unfair terms in order to obtain employment. To restrict an individual from practicing his trade or profession without very definite limitations would unduly burden the employee and constitute a general restraint in violation of public policy. On the other hand, the reasons for giving greater latitude in the enforcement of such contracts in connection with the sale of a business is very ably set out in the decision of Circuit Judge John R. Brown in **Budget Rent-A-Car Corporation of America v. Fein** (1965), 342 F. 2d 509, involving a decision by District Judge Lewis R. Morgan (now Circuit Judge and author of the decision below) interpreting Georgia law relative to restrictive covenants. Therein Judge Brown said:

> "In a sale of business situation, a reasonably drawn covenant will be enforced because it allows the seller to dispose of his good will and the purchaser to buy it. The necessity for a covenant is not so much that the seller has intimate knowledge of a particular line of business, but rather he, as a dominant personality, is so much the life of the business and is known to customers as such, that the buyer would run the very real risk of loosing what he had paid for should the seller shortly become his competitor. By protecting this transaction, the covenant facilitates the free transfer of property which is in the public interest."

The imaginary situation that concerned Judge Brown exists in fact in this particular case. Columbus Packing Company, Inc. agreed to buy the stock of Farris Plywood

Company for the sum of $465,000.00 provided the president and principal stockholder, John L. Farris, agreed not to compete with Farris Plywood Company for a period of five years. The complaint shows that less than 90 days after Mr. Farris terminated his connection with Farris Plywood Company he began business in Polk County, Georgia in concert with Claud T. Patat, Jr., former manager of Farris Plywood Company, and was engaging in the manufacture and production of plywood door skins which were selling in the same area in which Farris Plywood was operating the date the contract was executed. The complaint alleges that at the time it was filed the plaintiff had already been damaged in the sum of $100,000.00.

This case involves an instance in which an able business man dealt at arms length in the sale of the stock he and members of his family owned in a corporation which he had developed. He agreed not to compete with the corporation which he was selling. He and his family accepted the sum of $465,000.00 and in less than 90 days had violated his written agreement.

The United States Court of Appeals for the Fifth Circuit after reviewing all of the record, briefs for all parties, considering argument of counsel, reversed the decision of the District Court and remanded the case for trial upon its facts. The Court then considered the petition for rehearing which was denied.

Petitioners have shown no reason why the Supreme Court of the United States should grant certiorari to review the decision of the Circuit Court interpreting the provisions of a private contract.

The petition for a writ of certiorari should be denied. Respondent moves the Court for an award of damages pursuant to Rule 56 (4) of the Rules of this Court, if the

petition for writ of certiorari be denied, upon the ground that it is manifest that there was no ground for granting such a writ.

Respectfully submitted,

JAMES D. MADDOX,
P. O. Box 29,
Rome, Georgia 30161,
Attorney for Respondent.

Of Counsel:
MATTHEWS, MADDOX, WALTON & SMITH,
P. O. Box 29,
Rome, Georgia 30161,
WILLIAM J. THREADGILL,
THREADGILL & SMITH,
P. O. Box 3094,
Columbus, Mississippi 39701.